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Workmen's Compensation

Edward Schroll

WORKMEN'S COMPENSATION

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This sixth survey covers the legislative changes to our Workmen's Compensation Act[1] adopted by the 1965 session of the Florida Legislature and all reported judicial decisions since publication of the last survey.[2]

Little change was effectuated by the 1965 legislature, the most significant changes being in the field of apportionment and permanent disability benefits for body type injuries. One hundred and ten judicial opinions were handed down by the Florida Supreme Court and the district courts of appeal during the period surveyed. Of significance is the added fact that the Florida Supreme Court has adopted a new procedure of dispensing with oral argument pursuant to Florida Appellate Rule 3.10(e) and has denied certiorari without opinion in an additional one hundred and fourteen cases.[3] The subject matter covered by this survey

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1. FLA. STAT. ch. 440 (1965).

2. The last survey covered the 1963 session of the Florida Legislature and judicial decisions reported from Volume 131 SOUTHERN REPORTER 2nd Series to and including Volume 150 SOUTHERN REPORTER 2nd Series. This survey covers those reported decisions beginning with Volume 151 SOUTHERN REPORTER 2nd Series up to and including Volume 175 SOUTHERN REPORTER 2nd Series. For prior survey articles, see Burton, *Florida Workmen's Compensation—1935 to 1950*, 5 MIAMI L.Q. 74 (1950); Clements, *Workmen's Compensation*, 8 MIAMI L.Q. 469 (1954); Schroll, *Workmen's Compensation—1954-1959*, 14 U. MIAMI L. REV. 154 (1959); Schroll, *Workmen's Compensation*, 16 U. MIAMI L. REV. 216 (1961); Schroll, *Workmen's Compensation*, 18 U. MIAMI L. REV. 398 (1963).

3. The one hundred and fourteen cases were identifiable by the brief statement set forth by the court dispensing with oral argument and denying certiorari. Of the one hundred and fourteen petitions for writ of certiorari, twenty-six were taken by the employer-carrier, eighty-four were taken by the claimant with the remaining four being taken by both claimant and the employer-carrier.

will again be presented by topics rather than by a chronologically ordering of the cases.

I. SPECIAL DISABILITY FUND

The Special Disability Fund[4] as amended by the 1963 legislature suffered no additional changes by the 1965 session of the Florida Legislature. Little judicial activity has taken place concerning the still unsettled purposes and effect of the Special Disability Fund and there have been no judicial decisions interpreting the effect, if any, of the 1963 legislative changes.[5]

The fact that the Special Disability Fund does bestow additional benefits upon injured workmen suffering with pre-existing handicaps was again demonstrated in the case of *Dorsey v. L. & A. Contracting Co.*[6] In *Dorsey*, the claimant suffered a compensable injury to the thumb and forefinger of his right hand. As a result of pre-existing ulnar nerve palsy the remaining three fingers of claimant's right hand resembled a claw which admittedly constituted a pre-existing permanent physical impairment. The deputy commissioner found the claimant to have an overall sixty percent loss of use of the right hand of which twenty-five percent was attributable to the pre-existing disability resulting from the nerve palsy and thirty-five percent due to the injury. The deputy awarded compensation only for the thirty-five percent loss of use. In remanding the cause, the supreme court directed the deputy to make only one additional finding of fact, to-wit: the employer's notice of the pre-existing permanent physical impairment. The court stated that if the deputy would find that the employer had notice of the then pre-existing condition he must award, under the provisions of the Special Disability Fund, the full sixty percent loss of use of the hand. If the employer had no notice then the claimant would be limited to recover the thirty-five percent loss of use of the hand resulting from the effects of the accident alone. The court stated:

> We recognize that the requirement of knowledge by the employer of the worker's physical impairment will in some instances deny an injured claimant benefits for the combined effect of a prior and later injury when the employer does not have or cannot be charged with such knowledge.[7]

In the more recent decision of *Logan v. Maintenance, Inc.*,[8] an

4. FLA. STAT. § 440.49(4) (1963).

5. Justice Drew's dissenting opinion in the case of Hallett v. Westover Arms, 168 So.2d 544 (Fla. 1964), tends to indicate that judicial interpretation of the 1963 Special Disability Fund amendment will result in a change in the substantive benefit which the Fund has bestowed upon injured workmen suffering from pre-existing impairments or handicaps.

6. 155 So.2d 357 (Fla. 1963).

7. *Supra* note 6, at 359.

8. 173 So.2d 690 (Fla. 1965).

injured workman, who had previously undergone spinal surgery and fusion, sustained a new injury to his back as a result of a compensable accident. The employer had hired the claimant with full knowledge of his prior back operation and condition. As a result of the new injuries being superimposed upon the old injury, the claimant was adjudged by the deputy commissioner to be permanently and totally disabled under the provisions of the Special Disability Fund. On review, the full commission reversed the deputy and remanded the cause with directions to enter a new award under the apportionment sections.[9] The supreme court granted certiorari and quashed the order of the commission with directions that the deputy's award be reinstated. The court rejected the respondent's argument that the later injury merely added to what previously existed.

II. APPORTIONMENT[10]

In *Shores Dev., Inc. v. Carver*,[11] the claimant had stepped off a three foot scaffold landing with all his weight on his right foot. At the time of the incident, claimant was suffering from a progressive bone disease known as asceptic or avascular necrosis of the head of the right femur. X-rays taken two days later showed fracture lines in the diseased femur. The uncontradicted medical evidence demonstrated that an accident such as the one related by the claimant probably did accelerate to some degree the progress of the disease. The deputy found that the claimant had sustained a compensable injury which aggravated the preexisting disease and awarded temporary total disability benefits and medical care. Upon review it was contended by the employer and carrier that among the errors of the deputy was his failure to apportion under section 440.02(19) of the 1963 Florida Statutes. The supreme court agreed with the employer and carrier and remanded the cause to the deputy commissioner for apportionment of the temporary disability benefits as well as the medical care which claimant required.[12]

The difficulty encountered in attempting to separate and obtain treatment only for that portion of the injury attributable to the aggravation or acceleration was subsequently recognized in 1965. The legislature amended section 440.02(19), so as to make anomalies, as well as preexisting diseases, subject to the apportionment doctrine, but expressly limited the doctrine to permanent disability or death benefits. Compensation for temporary disability and medical benefits is no longer subject to apportionment under that subsection.

During the two years surveyed, the doctrine of apportionment has

9. FLA. STAT. § 440.02(19) (1961).
10. FLA. STAT. § 440.02(19) (1963).
11. 164 So.2d 803 (Fla. 1964).
12. *Accord*, Board of County Comm'rs v. Roberts, 172 So.2d 235 (Fla. 1965).

been applied to aggravation of pre-existing dermatitis conditions,[13] accidents initiating heart attacks,[14] pre-existing back injuries[15] and to prior back injuries with the same employer, the responsibility for which had been terminated by a joint petition for lump sum settlement, more commonly known as a "Wash-Out."[16] In permanent total disability cases subject to apportionment, the Florida Supreme Court again held that the doctrine shall apply to the weekly compensation rate rather than to the length of disability payments.[17]

In *Won v. Won's Chinese Restaurant*,[18] the deputy commissioner found that the claimant had suffered from a pre-existing intervertebral disc disease which was aggravated by a subsequent compensable industrial accident. It was further found that the claimant suffered a five percent permanent disability because of the aggravation and further, that the claimant had a thirty percent loss of wage earning capacity. Compensation for such injuries were accordingly awarded to her. On review, the commission reversed the award and remanded to the deputy for apportionment. Certiorari was granted by the Florida Supreme Court, the court stating:

> These findings, as to the claim of a want of apportionment, do not show a want of apportionment or that the deputy failed to apportion in making the award. The findings of the deputy do not appear to be insufficient.[19]

In the *Won* case, the court was apparently satisfied with the deputy's adjudication as to the degree of aggravation and did not require a determination of the overall disability which would then fall subject to apportionment.

III. HEART CASES

The Victor Wine rule, applicable to heart cases,[20] has undergone clarification, and its usage limited only to those cases where the heart attack was the *primary* injury upon which the workmen's compensation claim was filed. Where the heart injury was not the primary injury, but is a subsequent injury related in some way to the original compensable primary injury, the Victor Wine rule no longer applies. Rather, our

13. Hodges v. State Rd. Dep't, 171 So.2d 523 (Fla. 1965).
14. Scott v. Kerr, 156 So.2d 847 (Fla. 1963).
15. Overholser Constr. Co. v. Porter, 173 So.2d 697 (Fla. 1964).
16. Hallett v. Westover Arms, 168 So.2d 544 (Fla. 1964).
17. Mercury Cab v. Eibister, 168 So.2d 136 (Fla. 1964).
18. 174 So.2d 20 (Fla. 1965).
19. *Supra* note 18, at 21.
20. Victor Wine & Liquor, Inc. v. Beasley, 141 So.2d 581 (Fla. 1961) wherein the court announced the following rule for heart cases:

> When disabling heart attacks are involved and where such heart conditions are precipitated by work connected exertion affecting a pre-existing non-disabling heart disease, injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.

court has adopted the common law concept of "direct and natural results" in determining compensability of secondary or subsequent heart injury cases.

This new rule was first announced in *Sosenko v. American Air Motive Corp.*[21] The claimant, a thirty-eight year old male with an eleventh grade education, was involved in an admittedly compensable accident which resulted in a fracture of the right oscalcis. The accident resulted in considerable pain and temporary disability. Because of the pain the claimant lost sleep and was required to take sleeping pills. He became depressed and upset and feared that he would never be able to return to his old occupation as it required much climbing and walking. Approximately three months after his accident, claimant, after engaging in a normal day's activities and a casual evening with friends, experienced chest pain and was admitted to a hospital. His condition was diagnosed as an acute myocardial ischemia and posterior wall infarct. The carrier continued to pay claimant on a temporary total disability basis for his ankle injury, but denied responsibility for the heart attack. In quashing the order of the commission, and in remanding the cause to the deputy, the supreme court held that the Victor Wine rule was not applicable to this type of case. The court adopted the following rule as applicable:

> The basic rule is that a subsequent injury, whether an aggravation of the original injury, is compensable if it is the direct and natural result of a compensable primary injury. But if the subsequent injury is attributable to claimant's own negligence or fault, the chain of causation is broken, even if the primary injury may have contributed in part to the occurrence of the subsequent injury.[22]

Thus the *Sosenko* case was remanded to the deputy in order to determine if claimant's heart attack was the "direct and natural result" of the compensable primary injury. Of similar import was the subsequent decisions by the supreme court in the cases of *Scott v. Kerr*,[23] and *Tingle v. Board of County Comm'rs.*[24] In both of these cases, the claimants sustained an accident within the definition of the Workmen's Compensation Act[25] and subsequently incurred heart attack. The Victor Wine rule was held not to be applicable, the court stating in the *Scott* case:

> The record having established the occurrence of an industrial accident, the question remains regarding the causal relationship between the accident and the ensuing heart attack.[26]

The court went on to discuss the medical testimony regarding causal

21. 156 So.2d 489 (Fla. 1963).

22. *Id.* at 492. Disability produced by medical care furnished for compensable injury also compensable. Martini v. Kapok Tree Inn, 172 So.2d 829 (Fla. 1964).

23. 156 So.2d 847 (Fla. 1963).

24. 174 So.2d 1 (Fla. 1965).

25. FLA. STAT. § 440.02(19) (1963).

26. *Supra* note 23 at 849.

relationship and remanded both cases to the deputy commissioner for application of the doctrine of apportionment.[27]

Additional guidelines in determining whether a particular activity which results in a heart attack is non-routine were set forth by the supreme court in *Yates v. Gabrio Elec. Co.*[28] In that case, the claimant devoted approximately ninety percent of his time to relatively light work as an electrician's helper. The remaining ten percent was devoted intermittently to what could be described as heavy work, such as bending conduits and operating a ditch digger. While engaged in the heavier work and while lifting concrete blocks, claimant sustained a fatal heart attack. Medical testimony related the attack to the lifting of the concrete blocks. In quashing the order of the commission, and in reinstating the award of compensation benefits by the deputy, the court stated:

> We agree with Respondent that in ascertaining whether a particular activity is non-routine, we must look to the duty performed by the employee himself, rather than by his fellow workers. Similarly, we should examine the work done by the employee as an entirety, rather than some isolated segment of his activities. However, when, as here, the deputy is presented with evidence that a specific activity was non-routine and an examination of the employee's work history likewise sustained such a conclusion, the findings of the deputy regarding the non-routine nature of the specific activity should not be disturbed. The deputy's order in the instant case was well within the Victor Wine rule.[29]

The opinion of the court in the *Yates* case was not unanimous. Justice Caldwell dissented, arguing that the court had created an illusory exception which will vitiate the rule laid down in the *Victor Wine* case.

IV. DISABILITY BENEFITS

Non-disabling extended effects of scheduled injuries have been held not to remove the disability award from the operation of the scheduled benefits prescribed by the legislature.[30] In *Little River Bank & Trust Co. v. Neal*,[31] the claimant sustained an injury to his thumb with resulting pain extending into his hand. An award of disability benefits for a hand disability was reversed in that there was no showing that the pain extending into the hand was of a disabling type nor was it shown that the thumb injury interfered with the use of the remainder of the hand. Claimant's disability benefits, therefore, were limited to a thumb

27. For a factual case apportioning disability see Wilkes v. Oscars Transfer & Storage, 164 So.2d 810 (Fla. 1964).

28. 167 So.2d 565 (Fla. 1964).

29. *Supra* note 28, at 567.

30. FLA STAT. § 440.15(3) (1963).

31. 154 So.2d 809 (Fla. 1963).

disability. Conversely, in *Mobley v. Jack & Son Plumbing*,[32] the claimant sustained an elbow injury, the extended effects of which were found by the deputy to cause shoulder complaints. The deputy commissioner removed the disability award from the confines of the scheduled elbow injury and awarded disability benefits based on wage earning capacity loss due to the extended effects of the injury into the body. The award was affirmed.

The deputy's formula in arriving at the percentage of disability due to wage earning capacity loss in the case of *Pryor v. Sun Coast Medical Clinic*,[33] was reversed by the commission but subsequently reinstated by the Florida Supreme Court. In that case, the claimant was shown to have a disc injury to his spine which the medical experts evaluated to be equal to a fifteen percent functional disability. The deputy commissioner compared the claimant's average weekly wage of approximately one hundred and fourteen dollars to his post injury earnings of forty to fifty dollars per week and awarded a sixty percent permanent partial disability based on wage earning capacity loss.

In an earlier decision, *Board of County Comm'rs v. Alman*,[34] the court held that the average weekly wage at the time of the accident was equivalent to the wage earning capacity at the time of accident. The court affirmed a denial of permanent disability benefits wherein the post injury earnings were greater than the average weekly wage. The fact that claimants may earn the same or greater wages after an accident was held not to be controlling and would not prevent an award of permanent partial disability where other evidence showed an inability to compete in the open labor market.[35]

The celebrated case of *Southern Bell Tel. & Tel. Co. v. Bell*,[36] reached its terminal stage in 1964. The claimant had a twenty percent medical or functional impairment of the body as a whole. He had returned to work for the employer and had obtained a better job at higher pay. In reviewing the disabled employee's physical abilities, age and education as well as present employment status, the deputy found the claimant to have a twenty-one percent permanent partial disability, this finding being bottomed on the additional finding that the employment furnished the disabled workman by the employer was "sheltered." On review, it was determined that the finding that the workman was engaged in sheltered employment was not supported by competent substantial

32. 170 So.2d 41 (Fla. 1964).

33. 165 So.2d 745 (Fla. 1964).

34. 156 So.2d 850 (Fla. 1963). *Accord*, Principe v. Mount Sinai Hosp., 156 So.2d 385 (Fla. 1963).

35. Hughes v. Eastern Air Lines, Inc., 155 So.2d 135 (Fla. 1962). Cianci v. State Beverage Dep't, 157 So.2d 78 (Fla. 1963), salary increase also held not to be conclusive.

36. 167 So.2d 844 (Fla. 1964). See Bell v. Southern Bell Tel. & Tel. Co., 152 So.2d 473 (Fla. 1963), wherein court likened assessment of wage earning capacity loss to a prediction about the indefinite future.

evidence. The court ordered the claim to be denied. Subsequently in the case of *Montgomery Ward & Co. v. Hayes*,[37] a finding of forty percent wage earning capacity loss was reversed where the evidence only supported a functional or medical disability of thirty-five percent. The court again distinguished a loss of wage earning capacity as opposed to a mere functional loss or loss of wages. As a result of legislative changes made by the 1965 legislative session, the *Bell* and *Montgomery Ward* cases are, for the most part, of historical value only. The wage earning capacity loss section of the Workmen's Compensation Act was amended in 1965, by addition of the following provisions:

> [P]rovided, however, that for the purpose of this paragraph "disability" means either physical impairment or diminution of wage earning capacity, whichever is greater.[38]

As a result of the amendment, employers and their carriers are obligated to pay the "functional" or "medical" disability as distinguished from "wage earning capacity" where there is no showing that the wage earning capacity loss is greater.

A showing of greater wage earning capacity loss over and above the physical impairment was demonstrated in *Richardson v. City of Tampa*.[39] The claimant was a fifty-one year old illiterate with an intelligence quotient of sixty. As a result of a compensable accident, claimant sustained a herniated disc for which he refused surgery. The physicians evaluated the physical impairment at forty percent of the body as a whole. The deputy commissioner awarded sixty-five percent permanent partial disability. On review, the supreme court held that there was competent substantial evidence to support the sixty-five percent award, the court going on to state:

> But we are convinced that there was ample evidence to justify, indeed to require, that the deputy proceed beyond that point to declare total permanent disability, or 100 per cent. taking [sic] into account the tolerance the courts including this one, recognize that a person need not be entirely out of commission to be awarded compensation for total permanent disability.[40]

Similarly, the supreme court struck an unrealistic award of thirty percent permanent partial disability in the case of *Millender v. City of Carrabelle*.[41] The court reviewed all of the evidence, as well as the want of

37. 172 So.2d 581 (Fla. 1965).

38. FLA. STAT. § 440.15(3)(u) (1965).

39. 175 So.2d 43 (Fla. 1965). In this case, the court reaffirmed procedural shifting of the burden of proof to an employer to show employability once the injured workman demonstrates that he can handle only a specially created job.

40. *Supra* note 39, at 45.

41. 174 So.2d 740 (Fla. 1965).

evidence showing that there was any kind of work available which the injured workman could perform with any appreciable degree of regularity. The court cited its prior decision regarding regularity of employment and sheltered employment.

V. Medical Benefits

The obligation on the part of the employer, the employee, and the medical practitioner under the Workmen's Compensation Act has had some clarification during the period surveyed. Physicians as well as medical institutions must file reports with the Florida Industrial Commission and with the employer, the failure to do so relieving the employer and carrier of the obligation for payment of the cost of the medical care.[42] The filing requirement may be waived by the commission[43] and may also be waived by conduct of the parties. Payment of the medical expenses incurred constitutes waiver, at least to the extent of the payment.[44]

The lack of a request for medical care will relieve the employer of need to pay for medical care subsequently obtained by the workman without said requests.[45] However, in those instances where the employer fails to furnish medical care, this failure does not excuse the requirement concerning the filing of reports.[46]

Two cases concerned the question of the workman's choice of physician. In *Bowman Nurseries v. King*,[47] an injured workman was desirous of obtaining medical care with a particular doctor. The carrier objected to the workman's choice of physician and offered other medical care which was refused by the workman. The workman obtained the medical care under the physician of his choosing. Payment of the billing was ordered by the deputy, but the deputy was reversed upon review. It was held that the carrier had not authorized the treatments, had offered other medical care and was, as a consequence, not responsible for the medical billing incurred. In the subsequent case of *Black v. Blue Ribbon Laundry*,[48] the commission reversed a deputy's order directing payment of medical expenses incurred by a workman with a physician of his choosing. The commission's reversal was based on the fact that the physician was "not authorized." In reversing the commission, and in reinstating this aspect of the deputy's order, the court noted the deputy's finding that the injured workman had acted reasonably in seeking the aid of the physician

42. Mobley v. Jack & Son Plumbing, 170 So.2d 41 (Fla. 1964); Board of County Comm'rs v. Southern Fla. Sanitarium & Hosp. Corp., 173 So.2d 131 (Fla. 1965).
43. Fla. Stat. § 440.13(1) (1963).
44. See cases note 42 *supra*.
45. Montgomery Ward & Co. v. Hayes, 172 So.2d 581 (Fla. 1965).
46. Strickland v. Al Landers Dump Trucks, Inc., 170 So.2d 445 (Fla. 1965).
47. 155 So.2d 871 (Fla. 1963).
48. 161 So.2d 532 (Fla. 1964).

in whom he had confidence, and that it was necessary that he have immediate care and hospitalization.

As an incident to medical benefits, the Florida Industrial Commission has promulgated Rule 18 pertaining to reimbursement for traveling expenses incurred in obtaining medical care. The Rule establishes the reimbursement rate at seven and one-half cents per mile. In striking the seven and one-half cent provision as legislative in nature, the supreme court held that unless the parties in workman's compensation proceedings stipulate on a mileage rate, the reasonable actual cost of traveling expenses will have to be proven the same as any other factual issue.[49]

In *South Coast Constr. Co. v. Chizauskas*,[50] a claim was made for nursing services as a result of total blindness, it being alleged that the claimant needed certain nursing assistance. The deputy commissioner awarded nursing care not on a finding that nursing care was required, but only on findings depicting that services in the nature of housekeeping services were needed. In reversing the award, the court stated:

> The findings of the Deputy quoted above are amply supported by the record. The Full Commission did not find to the contrary. These findings clearly show that the Claimant does not need . . . remedial treatment, care and attendance under the direction and supervision of a qualified physician or surgeon, or other recognized practitioner, nurse or hospital . . . . These are the kind of services which Section 440.13 requires an employer-carrier to furnish in an appropriate case. Housekeeping and related services are not required to be furnished.[51]

Once an award has been entered requiring payment of all medical expenses which a claimant may incur as a result of a compensable injury, it is not necessary to subsequently demonstrate a mistake of fact or change of condition in order to obtain further medical benefits. The claimant need only show a need for further medical care.[52] If, as a result of the furnishing of medical care, greater disability results, the resulting disability is also compensable.[53]

VI. COVERAGE

Workmen's compensation coverage has been interpreted to extend to the direct and natural result of compensable primary injuries[54] and to disability resulting from medical care furnished for the primary injury.[55]

49. Mobley v. Jack & Son Plumbing, *supra* note 42.
50. 172 So.2d 442 (Fla. 1965).
51. *Supra* note 50, at 444.
52. Bryant v. Elberta Crate & Box Co., 156 So.2d 844 (Fla. 1963).
53. Martini v. Kapok Tree Inn, 172 So.2d 829 (Fla. 1964).
54. Sosenko v. American Air Motive Corp., 156 So.2d 489 (Fla. 1963).
55. Martini v. Kapok Tree Inn, *supra* note 47.

Coverage has been denied to employees whose disability or death has resulted from horseplay of such substantial character as to amount to abandonment of employment,[56] and to an employee whose injuries were occasioned after work, but as an incident to transportation furnished to him as a matter of convenience, rather than as part of his employment contract.[57]

Benefits of the Workmen's Compensation Act have also been extended to persons not covered by the Act, but who have been brought under its provisions through waiver.[58]

In *Goldstein v. Gray Decorators, Inc.*,[59] an injured workman was held not to have waived benefits of the Workmen's Compensation Act in that the waiver or election not to come under the Act did not meet the statutory requirements. The court held the claimant's intent immaterial, unless he expressed it as required by statute.

A fact that the industrial accident occurred outside the territorial limits of the state of Florida has not, necessarily, resulted in a denial of coverage under the Florida Workmen's Compensation Act. In *Miller Contracting Co. v. Hutto*,[60] the injured workman sustained injury in Georgia and received compensation under the Georgia law. His claim for benefits under the Florida Workmen's Compensation Act was affirmed, the court holding that Florida had jurisdiction by virtue of the contract of employment having been made in Florida. In the earlier case of *Butler v. Allied Dairy Prod., Inc.*,[61] the claimant was hired in Missouri to deliver dairy products to Miami, Florida. The injury occurred in Missouri. However, the employer's principal place of business was in Miami and claimant's wages and compensation benefits were also paid from Miami. The deputy held the employer waived jurisdiction and awarded benefits under the Florida Workmen's Compensation Act. On review, the full commission reversed the deputy. In reinstating the order of the deputy, the supreme court stated that inasmuch as the claimant was serving an industry in

56. City of Miami v. Granlund, 153 So.2d 830 (Fla. 1963). Claimant, believing a gun was empty, aimed it at a fellow employee and then at his own head and pulled the trigger. A bullet was left in the chamber and as a result, claimant was killed. The majority of the court denied benefits under a split decision with an extended dissenting opinion.

57. General Dev. Corp. v. Kelley, 159 So.2d 471 (Fla. 1964), furnishing of transportation makes hazards of highway part of hazards of job, Swartzer v. Food Fair Stores, Inc., 175 So.2d 36 (Fla. 1965). *Accord*, Lee v. Florida Pine & Cypress, 157 So.2d 513 (Fla. 1963), no coverage if transportation for personal motive, Brown v. Winter Haven Citrus Growers Ass'n, 175 So.2d 193 (Fla. 1965).

58. In Strickland v. Al Landers Dump Trucks, Inc., *supra* note 52, the claimant therein was injured while cleaning his own truck used in the hauling business of the employer association. The association had obtained workmen's compensation coverage for the claimant who was held to be an independent contractor. However, due to the obtaining of coverage, it was held that the exclusion was waived pursuant to FLA. STAT. § 440.04(3).

59. 166 So.2d 438 (Fla. 1964). See FLA. STAT. § 440.05(2), (3) for the statutory provisions allowing an employee to elect not to come under the Act.

60. 156 So.2d 745 (Fla. 1963).

61. 151 So.2d 279 (Fla. 1963).

this state when hurt, its conclusion that this state should shoulder the burden does not seem to work any injustice. The court stated:

> It is to us incongruous that the carrier and employer could recognize the claim for the lengthy period we have described and then upon demand for further benefits successfully claim at that late date that, after all, there was no power in the Commission to act.[62]

Subsequently, in the case of *Azarian v. Azarian*,[63] a carrier had paid temporary total disability as well as fifteen weeks for permanent partial disability after which claimant filed claim for further benefits. The carrier controverted the claim and later took the position that the claimant was not an employee. The argument that the carrier had accepted the claim by payment was rejected. The court held:

> The mere fact that a carrier initially accepts a claim as compensable has no bearing on its ultimate liability for payment should a claim be filed for additional benefits.[64]

Coverage has been afforded where the compensable origin for an injury was found in the result rather than the suddenness of the cause. In *Zerwal v. Caribbean Modes, Inc.*,[65] an injured workman suffering with a herniated disc could not show any specific or sudden incident as the cause of his herniated disc, but rather could show only a series of lifting incidents which culminated in sharp back pain, subsequently diagnosed as a herniated disc. In affirming its prior decisions,[66] the court stated:

> As indicated in the previous opinion of this court, the doctrine of current decisions has been clear that an internal failure brought about by exertion in the performance of the regular employment may be found to be an injury by accident without the necessity of showing that such injury was preceded by an unusual external incident.[67]

The "last injurious exposure" doctrine,[68] utilized in dermatitis cases, was somewhat modified in the case of *Wesley's, Inc. v. Caramello*.[69] In that case, the claimant suffered a contact dermatitis while in the employ of Wesley's, Inc. He filed claim for disability as a result of this exposure and subsequently, while in another employment, suffered a re-exposure. Wesley's, Inc. attempted to escape responsibility for the disability result-

62. The decision of the court centered around the claimant's entitlement to compensation rather than the jurisdiction of the Florida Industrial Commission.
63. 166 So.2d 442 (Fla. 1964).
64. *Id.* at 443.
65. 170 So.2d 840 (Fla. 1965).
66. See Schroll, *Workmen's Compensation*, 18 U. MIAMI L. REV. 504 (1963).
67. *Supra* note 58, at 842.
68. FLA. STAT. § 440.151(3) (1963).
69. 156 So.2d 853 (Fla. 1963).

ing from the claimant's dermatitis while in its employment by urging that the claimant was last exposed to conditions causing a flair-up of the dermatitis in his subsequent employment thereby relieving Wesley's, Inc. of further responsibility. The court rejected the argument and distinguished the case from those cases in which a claimant suffers exposure in several employments with the distinguishing factor being the filing of a claim prior to suffering subsequent exposure.

VII. Average Weekly Wage

The determination of an injured employee's average weekly wage, as prescribed by statute, cannot be altered. In *Waymire v. Florida Industrial Comm'n*,[70] the workman sustained injury during a slack period of sale. During the thirteen weeks immediately prior to this accident he earned an average of approximately fifty-six dollars per week. Normally his earnings were a hundred dollars per week. In affirming the deputy's determination of claimant's average weekly wage by utilization of the actual earnings during the thirteen weeks prior to the accident, the supreme court held that the deputy has no discretion unless the standards fixed by the legislature cannot be met, regardless of "slack periods."

In determining what amount constitutes wages, the supreme court ruled in the case of *Pryor v. Sun Coast Medical Clinic*,[71] that an injured workman's gross earnings of approximately one hundred and thirty-eight dollars per week was properly reduced by twenty-five dollars per week, this latter amount being paid by the injured workman to an assistant. The injured workman also had two stepsons assisting him, but the monies paid by the injured workman to the two stepsons were held to be non-deductible from the average weekly wage due to the father-son family relationship.

The average weekly wage not only determines the weekly compensation rate, but also is representative of the pre-injury earning capacity for measuring wage earning capacity loss.[72] When the parties rely on and stipulate to an average weekly wage, this stipulation is binding on the parties as well as the deputy commissioner who is without authority to find an average weekly wage other than that to which the parties have stipulated.[73]

VIII. Statutes of Limitations

Little activity has been found in the period surveyed regarding the statutes of limitations contained in the Workmen's Compensation Act.

70. 174 So.2d 404 (Fla. 1965).

71. 165 So.2d 745 (Fla. 1964).

72. Principe v. Mount Sinai Hosp., 156 So.2d 385 (Fla. 1963); Board of County Comm'rs v. Alman, 156 So.2d 850 (Fla. 1963).

73. Principe v. Mount Sinai Hosp., *supra* note 64; Mobly v. Jack & Son Plumbing, 170 So.2d 41 (Fla. 1964).

What constitutes medical care sufficient to toll the running of the statute relative to the furnishing of medical care was reviewed on two occasions. In *Gonzalez v. Allure Shoe Corp.*,[74] a claimant's compliance with the employer's physician's instructions to soak her arm and to take aspirins was not considered such treatment as contemplated by the legislature to toll the running of the statutes of limitations. In *Food Fair Stores, Inc. v. Tokayer*,[75] the furnishing of an electrocardiogram was determined to be such remedial treatment as would toll the statute of limitations.

Carriers may not raise the statute of limitations on medical benefits where the insured employer, through a successive carrier, in fact, furnished medical benefits within the statutory time. In *Iowa Nat'l Mut. Ins. Co. v. Webb*[76] a workman sustained back injuries in 1956, and again injured his back in 1958, both injuries occurring with the same employer. However, insurance coverage had changed and there were different insurance carriers on each accident. The insurance carrier covering the last accident furnished the injured workman with medical benefits for the last accident, as well as for the effects of the earlier 1956 accident. The carrier on the first accident raised the statute of limitations as a defense to any further claim for medical benefits. In denying the defense, it was held that the benefits furnished the injured workman by the second carrier were considered to be furnished by the employer, thereby tolling the running of the statute of limitations.

IX. THE DEPUTY COMMISSIONER

The deputy commissioner[77] has been held to his statutory duty to make sufficient findings of fact on all evidence presented and his failure to do so requires a remand to him for the entry of a new order containing adequate findings of fact.[78] The deputy's obligation to make adequate findings of fact is identical in modification proceedings and in original proceedings.[79] In the instances where the deputy made insufficient findings, based on a wrong conclusion of law, the cause will be remanded to him for further consideration.[80] Remands will not be permitted, despite the deputy's failure to make adequate findings of fact, where a review of the record reveals no evidence which would support those findings necessary upon which the award would be based.[81] Where such evidence exists,

74. 160 So.2d 703 (Fla. 1964).

75. 167 So.2d 563 (Fla. 1964).

76. 174 So.2d 21 (Fla. 1965).

77. The 1965 Legislature increased the salary from $13,000 to $15,000 per year.

78. Lee v. E. T. Usher Pulpwood Co., 174 So.2d 733 (Fla. 1965); O'Brien Associates v. Smith, 159 So.2d 228 (Fla. 1963); Freeman v. Acme Roof Decks, Inc., 173 So.2d 685 (Fla. 1965).

79. Wenshaw v. Smith, 151 So.2d 3 (Fla. 1963).

80. Sauder v. Coast Cities Coaches, Inc., 156 So.2d 162 (Fla. 1963).

81. Cameron v. City of Miami Beach, 152 So.2d 163 (Fla. 1963); (record devoid of evidence to excuse or waive notice); Friendly Frost Used Appliances v. Reiser, 152 So.2d 721 (Fla. 1963) (deputy's order treated as if it had sufficient findings and after which the court

or where the deputy commissioner failed to reconcile conflict in the evidence, or where his findings of fact are unclear, the cause will be remanded to him.[82]

Orders of deputy commissioners which contain sufficient findings of fact and which are supported by competent substantial evidence have been consistently affirmed when subjected to judicial review. Reversals by the full commission, with or without remand, have in turn been reversed by the supreme court where the deputy's findings were, in fact, sufficient.[83] Where the deputy commissioner makes findings of fact which are supported by competent substantial evidence, these findings must be affirmed on review:[84] the parties being unable to question the lack of evidence to support a finding when it was stipulated that the deputy may reach his finding without necessity of evidence.[85] The tendency of deputy commissioners to render ultimate judgments which would require remand of the cause to them, rather than making adequate findings of fact as conclusions of law, was noted by the supreme court in the case of *Liberty Mut. Ins. Co. v. Durrance.*[86] The court again observed that the deputy's failure to comply with his responsibility means months and possibly years of delay in the ultimate decision in compensation cases where prompt action is so essential.

Awards for wage earning capacity loss where evidence demonstrated only functional disability,[87] hand disability where the evidence disclosed only thumb disability, and unsupported findings that an injured workman was an employee,[88] have all been stricken upon review. The deputy commissioner's ultimate conclusion must also conform to his findings and to the evidence. Unrealistic awards have been held to be equally erroneous.[89]

went on to review record and find no competent substantial evidence to support such finding); City of Miami Beach v. Miller, 167 So.2d 229 (Fla. 1964) (deputy failed to find causal relationship but review of record disclosed no evidence upon which such finding could be based.).

82. Lee v. E.T. Usher Pulpwood Co., *supra* note 78; Pryor v. Suncoast Medical Clinic, 165 So.2d 745 (Fla. 1964).

83. Bell v. Southern Bell Tel. & Tel. Co., 152 So.2d 473 (Fla. 1963); deputy already found facts for which his order was reversed and remanded by the full commission; Won v. Won's Chinese Restaurant, 174 So.2d 20 (Fla. 1965); deputy in fact apportioned and his finding in this regard not insufficient.

84. Pryor v. Suncoast Medical Clinic, *supra* note 74; Howard v. O'Neil, 166 So.2d 793 (Fla. 1964); Yates v. Gabrio Elec. Co., 167 So.2d 565 (Fla. 1964); Martini v. Kapok Tree Inn, 172 So.2d 829 (Fla. 1964).

85. Food Fair Stores Inc., v. Brown, 159 So.2d 474 (Fla. 1964); Waymire v. Florida Industrial Comm'n, 174 So.2d 404 (Fla. 1965).

86. 174 So.2d 6 (Fla. 1965).

87. Montgomery Ward & Co. v. Hayes, 172 So.2d 581 (Fla. 1965).

88. Pain extending from thumb into hand not a disabling type, Little River Bank & Trust Co. v. Neal, 154 So.2d 809 (Fla. 1963); initial acceptance of claimant as an employee of no evidentiary value, Azarian v. Azarian, 166 So.2d 442 (Fla. 1964).

89. Millender v. City of Carabelle, 174 So.2d 740 (Fla. 1965). See also Drew v. Wellman-Lord Eng'r, Inc., 166 So.2d 136 (Fla. 1964), wherein the deputy merely adopted a medical rating which was alleged to have been accepted by the employer-carrier, the court held that the deputy failed to make an individual determination as to the degree of claimant's permanent disability.

Deputy commissioners have the authority to make determinations on issues as they arise.[90] They may make reasonable deductions from the evidence,[91] and may give greater weight to physical evidence and lay testimony than to scientific opinions of experts.[92]

On two separate occasions it was again held that the deputy commissioner does not have the power to pierce the corporate veil in those instances where it is necessary to determine who is responsible for compensation benefits to a disabled workman.[93] Orders entered by deputy commissioners which are not appealed become part of the law of the case.[94] Once an appeal has been taken, the deputy commissioner may no longer entertain proceedings on the trial level, the appeal having divested him of his trial powers.[95] Should there be a remand to the deputy commissioner, the deputy has the discretion to receive additional evidence for further trial proceedings, unless the remanding order restricts his functions to certain purposes.[96]

In 1963 and 1964 three cases have been brought to the district courts for enforcement of awards of the deputy commissioners. In *Phoenix Assur. Co. v. Merritt*,[97] the insurance carrier had complied with an award of compensation benefits for eight months, after which it stopped payment claiming that the disabling condition was not related to the accident. The second district ordered reinstatement of temporary total disability, and held that it had no jurisdiction to revoke, amend or set aside the workmen's compensation order which was still in force and effect. In *Century Brick Corp. of Am. v. Gatewood*,[98] a jail sentence of sixty days for contempt in failing to pay a compensation award was reversed as an imprisonment for non-payment of debt.

X. THE FULL COMMISSION

The full Florida Industrial Commission, commonly termed the "full commission," is the initial reviewing body where appeals are taken from the order of deputy commissioners.[99] The 1965 legislature amended section 440.20(6) Florida Statutes, 1963, so as to allow an employer and carrier twenty days to comply with an award before penalties are as-

90. Bryant v. Elberta Crate & Box Co., 156 So.2d 844 (Fla. 1963).

91. Hughes v. Eastern Airlines, Inc., 155 So.2d 135 (Fla. 1962).

92. Jeffers v. Pan Am. Envelope Co., 172 So.2d 577 (Fla. 1965).

93. Roberts Fish Farm v. Spencer, 153 So.2d 718 (Fla. 1963); Goldstein v. Gray Decorators, Inc., 166 So.2d 438 (Fla. 1964).

94. Hodges v. State Rd. Dep't, 171 So.2d 523 (Fla. 1965).

95. Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965).

96. Tampa Elec. Co. v. Crosby, 168 So.2d 70 (Fla. 1964).

97. 160 So.2d 552 (Fla. 2d Dist. 1964). Assertion that enforcement proceedings were not available for medical benefits, attorneys' fees and that administrative remedies must be first exhausted denied in Martinque Hotel, Inc. v. Kasner, 153 So.2d 68 (Fla. 3d Dist. 1963).

98. 157 So.2d 95 (Fla. 3d Dist. 1963).

99. FLA. STAT. § 440.25(4) (1963).

sessed. Previously, the employer and carrier were subject to penalties if the award was not paid within fourteen days, although under section 440.25(4)(a) Florida Statutes, 1963, the award was not final until twenty days transpired, during which time either of the parties could appeal to the full commission. In the 1965 legislative change, the sections were further modified and the assessment of penalties was eliminated where review is taken to the full commission. Previously, only appeals to the supreme court would relieve the employer and carrier of penalties.[100] In its review, the full commission reviews the transcript of proceedings, and where it is impossible to have the transcript of proceedings transcribed, the cause must be remanded for a trial *de novo*.[101] Where all three members of the full commission are not present, the remaining members may nevertheless review the cause if there is no objection made at the time the review takes place. However, the commission is not free to determine questions which are not properly raised on appeal.[102] On review, the full commission can only determine whether the deputy's order is supported by competent substantial evidence and meets the essential requirements of law. The full commission has no jurisdiction to re-evaluate the evidence and substitute its judgment for that of the deputy.[103]

XI. Review by the Supreme Court

Orders of the full commission entered pursuant to section 440.25 Florida Statutes, 1963, are reviewable only by petition for writ of certiorari to the supreme court.[104] The supreme court will not review issues which are not raised in the application for review before the full commission. Nor will the court review grounds not raised concisely and particularly in the application for review to the full commission.[105] The court has also granted motions to dismiss petitions for writ of certiorari which present only abstract questions of law,[106] and has declined, on its own motion, to review orders of the full commission which are not final.[107] In *Berrien v. United States Phosphoric Prods.*,[108] the court dispensed with

100. Fla. Stat. § 440.20(6) (1963) excepted awards from the operation of the 20 percent penalty only if review was had pursuant to Fla. Stat. § 440.27 (1963), this being the section dealing with judicial review by the supreme court. This section was amended by deleting Fla. Stat. § 440.27 (1963), and substituting therefore Fla. Stat. § 440.25 (1963), the section permitting review by the full commission.

101. Lieber v. Morris Lieber, Inc., 168 So.2d 313 (Fla. 1964).

102. Davis v. Waves Motel, 169 So.2d 484 (Fla. 1964); Wesley's, Inc. v. Caramello, 156 So.2d 853 (Fla. 1963).

103. Scott v. Kerr, 156 So.2d 847 (Fla. 1963).

104. Fla. Stat. § 440.27(1) (1963).

105. Davis v. Florida Linen Serv., 170 So.2d 289 (Fla. 1964); Westinghouse Elec. Supply Co. v. Reagan, 159 So.2d 222 (Fla. 1964); Montgomery Ward & Co. v. Hayes, 172 So.2d 581 (Fla. 1965).

106. Brown v. Cott Bottling Co., 152 So.2d 476 (Fla. 1963).

107. Liquori v. Heftler Constr. Co., 160 So.2d 113 (Fla. 1964).

108. 157 So.2d 809 (Fla. 1963).

oral argument pursuant to Florida Appellate Rule 3.10 and denied certiorari. Since adopting this procedure, the court has denied oral argument and denied certiorari in 114 cases during the period surveyed.

XII. MODIFICATION

The handling of modification proceedings before the deputy commissioner is no different than in any other type of proceeding before the deputy, it being the deputy's obligation to make express findings of fact on the issues presented.[109] It is not necessary, in modification proceedings, for the modification award to be supported by medical testimony;[110] in those instances where the prior order required the furnishing of medical care, a modification proceeding itself is not necessary in order to obtain previously ordered medical benefits.[111] Orders which deny all benefits other than those stipulated to are subject to modification.[112] However, the statutory basis of "mistake of fact" was almost ruled out of existence in the case of *Steel v. A.D.H. Bldg. Contractors, Inc.*:[113]

> One entering a stipulation relative to present facts should be sure of his grounds before he executes the agreement and subsequently reaps benefits from it. If he is unsure, he should consult counsel at his elbow or should simply decline and rely on the determination of the deputy and the full commission. Such an agreement should neither be ignored nor set aside in the absence of fraud, overreaching, misrepresentation or withholding facts by the adversary or some such element as would render the agreement void.[114]

In an earlier decision of *Souder v. Coast Cities Coaches, Inc.*,[115] it was held that a mistake of fact is one made by the deputy. In order to show a mistake of fact, the claimant must demonstrate an erroneous factual finding or conclusion drawn by the deputy from the evidence. The mistake must be the factual error of the deputy and not of the witnesses. In *Steel* the worthlessness of cumulative evidence was again stressed. In *Dixon v. Bruce Constr. Co.*,[116] the court stated that petitions for modification, founded on mistakes of fact, would form a temptation to review, re-try or revise what has happened and gone on before, whereas petitions for modification based on a change of conditions would, by the term itself, indicate occurrences or developments which were not foreseen and probably could not have been anticipated when the injury was first appraised

109. Wenshaw v. Smith, 151 So.2d 3 (Fla. 1963); O'Brien Ass'n v. Smith, 159 So.2d 228 (Fla. 1963).

110. Jeffers v. Pan Am. Envelope Co., 172 So.2d 577 (Fla. 1965).

111. Bryant v. Elberta Crate & Box Co., 156 So.2d 844 (Fla. 1963).

112. The Fruit Bowl, Inc. v. Cheathem, 155 So.2d 865 (Fla. 1963).

113. 174 So.2d 16 (Fla. 1965).

114. *Supra* note 113, at 19.

115. 156 So.2d 162 (Fla. 1963).

116. 160 So.2d 116 (Fla. 1963).

and compensation fixed. However, in *Felix v. Lawnlite Co.*,[117] the deputy anticipated a reduction in claimant's disability with adequate perseverance, and he determined her disability accordingly. When the reduction of disability failed to materialize, modification proceedings were brought. The deputy commissioner re-appraised the disability and awarded further benefits, but his award was reversed on review. Subsequent surgery has been held to constitute a change of condition.[118] In *Food Fair Stores, Inc. v. Tokayer*,[119] it was pointed out that the statute of limitations in modification proceedings runs separately on the compensation or money benefits as opposed to the medical benefits.

XIII. Attorneys' Fees

Attorneys' fees have been allowed on the trial level where the parties have agreed to all issues, the court holding that a concession of some responsibility is not a concession by the employer and carrier that they were obligated for the particular disability ultimately agreed upon.[120] In *Pollard v. State Rd. Dep't*,[121] attorney's fees in the amount of 350 dollars were awarded as a result of an order finding claimant still temporarily and totally disabled. Eventually it was determined that the claimant sustained total loss of one eye after which claimant's attorney petitioned for an allowance of additional fees. The employer took the position that the permanent disability for loss of the eye was voluntarily paid, and that the attorney was not entitled to fees based on this portion of the ultimate recovery. The employer's position was affirmed by the court by a split decision. Subsequently, in *Boyd v. Southeastern Util. Serv. Co.*,[122] the *Pollard* case was distinguished, the court emphasizing the fact that compensation benefits there were initially controverted.

In *Miami Originals, Inc. v. Ruiz*,[123] the award of benefits upon which the attorney's fee was based was, in part, reversed on appeal. In remanding the cause to the deputy, the court stated that the attorney's fee itself must be recomputed in view of the diminished benefits obtained. Where the deputy commissioner sets the attorney's fee, based on stipulations of the parties that he may do so without evidentiary basis, the parties cannot subsequently complain of this lack of evidence.[124]

117. 174 So.2d 743 (Fla. 1965).

118. Howard v. O'Neil, 166 So.2d 793 (Fla. 1964); for another case a modification was affirmed see Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965).

119. 167 So.2d 563 (Fla. 1964).

120. Thompson v. W.T. Edwards Tuberculosis Hosp., 164 So.2d 13 (Fla. 1964).

121. 151 So.2d 274 (Fla. 1963).

122. 172 So.2d 817 (Fla. 1965); here a $350.00 fee was initially awarded and subsequently, the claimant's rights were "washed out" against the recommendations of claimant's attorney. In order to obtain the wash-out, claimant discharged his attorney and settled the case directly with the carrier. Claimant's attorney held to be entitled to a fee on all benefits including the wash-out settlement.

123. 171 So.2d 172 (Fla. 1965).

124. Food Fair Stores Inc., v. Brown, 159 So.2d 474 (Fla. 1964).

In enforcement proceedings, the circuit court has no jurisdiction to award additional attorneys' fees for services rendered in obtaining enforcement of the award.[125] On the appellate level, claimants' attorneys are entitled to attorneys' fees in defending awards even though the claimant's rights are not directly contested, but rather where the principal issue involves the responsibility of individual insurance companies.[126] Reasonableness of attorneys' fees on the appellate level is not subject to apportionment.[127] In *Adjustable Joist Sys. v. Walker*,[128] the court denied a motion for attorneys' fees because of the failure to comply with the relevant Florida Appellate Rules.

XIV. NOTICE

In *Overholzer Constr. Co. v. Porter*,[129] the employee advised his employer that he was suffering from back pain, but failed to notify the employer that it was caused by an accident. In dismissing the claim for lack of notice the court pointed out that section 440.18 Florida Statutes, 1963 (notice section) was enacted to enable an employer to make a prompt investigation of an accident and ensuing injury so that early medical attention may be provided if the investigation proves the accident compensable. In *Drew v. Welman-Lord Eng'r, Inc.*,[130] the court reversed a deputy's finding of lack of notice where the evidence demonstrated that the claimant notified his general foreman of the accident, and also reported the accident to his immediate foreman. The court held that claimant's notice of the accident to his general and immediate foremen was sufficient notice to the employer.

XV. WAIVER

With the case of *Westinghouse Elec. Supply Co. v. Reagan*,[131] the concept of waiver was brought into the Workmen's Compensation Act. In that case a stipulation had been entered into which discharged both the employer and carrier's obligation to pay compensation benefits, but specifically made clear that liability for future medical benefits would remain open. Claimant's attempt to subsequently set aside the stipulation was denied, the court stating:

> Under § 440.05, Fla. Statutes, an employee may waive all of the benefits of the Workmen's Compensation Act. We see no logical

125. A.D.H. Building Contractors v. Steele, 171 So.2d 184 (Fla. 3d Dist. 1965).

126. Schill v. Florida Industrial Comm'n, 173 So.2d 447 (Fla. 1965).

127. Overholser Constr. Co. v. Porter, 173 So.2d 697 (Fla. 1964).

128. 151 So.2d 641 (Fla. 1963).

129. *Supra* note 118; *Accord*, Cameron v. City of Miami Beach, 152 So.2d 163 (Fla. 1963).

130. 166 So.2d 136 (Fla. 1964). The deputy's finding relative to the claimant's complaints were also found to have been unduly influenced by his erroneous finding relative to notice.

131. 159 So.2d 222 (Fla. 1964).

reason why an employee may not waive specific provisions of the Act.[132]

In subsequent decisions, the court held that Rule 3 of the Rules of Procedure adopted by the Florida Industrial Commission was mandatory but could be waived,[133] that employees excluded by the Workmen's Compensation Act may be brought under the Act by waiver,[134] and that an employer and carrier had waived the right to contest payment of a medical billing for an unauthorized physician who failed to file medical reports by virtue of payment of the physician's billing.[135] However, in *Hodges v. State Road Dep't*,[136] the payment of compensation was held not to constitute a waiver of the statute of limitations, rather it was held to be a mere gratuity.

XVI. PENALTIES

Where reasonable cause can be shown, penalties will not be assessed against an employer and carrier.[137] However, if no justifiable excuse can be presented for the failure to pay compensation, penalties will be assessed.[138] The assessment of penalties may be made by the deputy or by the circuit court in enforcement proceedings.[139]

XVII. PROCEDURE

Some statutory change was accomplished by the 1965 session of the legislature regarding procedure. Claims must now be filed with the office of the Florida Industrial Commission in Tallahassee rather than with the local offices of deputy commissioners. Should a claim be filed with the deputy, the statute now requires that he immediately mail said claim to the Florida Industrial Commission in Tallahassee, and that his failure to do so shall in no way prejudice the rights of employees under the Workmen's Compensation Law.[140] Section 440.25 was also amended to describe the particular commission's office in Tallahassee as the place of filing claims.[141] This section previously required ten days' notice to all interested parties of a hearing, said notice to be served by registered mail. The

132. *Supra* note 131 at 225.

133. Black v. Blue Ribbon Laundry, 161 So.2d 532 (Fla. 1964).

134. Strickland v. Al Landers Dump Trucks, Inc., 170 So.2d 445 (Fla. 1965).

135. Mobley v. Jack & Son Plumbing, 170 So.2d 41 (Fla. 1964).

136. 171 So.2d 523 (Fla. 1965).

137. Miami Originals, Inc., v. Ruiz, 171 So.2d 172 (Fla. 1965); Montgomery Ward & Co. v. Hayes, 172 So.2d 581 (Fla. 1965).

138. Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965).

139. *Supra* note 125.

140. FLA. STAT. §§ 440.19(c),(d),(e) (1963); (No provision was made to toll the running of the Statute of Limitations where the claim is filed with the deputy, the amendments requiring the claim to be filed with the Industrial Commission's office in Tallahassee.) see FLA. STAT. §§ 440.19(a),(b) (1963).

141. FLA. STAT. § 440.25(1) (1963).

section was amended to increase the notice period to fifteen days and to permit service by certified as well as registered mail.[142]

Additional legislative changes were made concerning controversies where two or more insurance carriers are obligated to pay benefits under the Workmen's Compensation Act; the amendments limit the reimbursement provision where it can be shown that the carrier, from which reimbursement is sought, has been prejudiced by lack of knowledge or notice of its potential liability. In this event, reimbursement can only be had with respect to payments made after the carrier had knowledge or notice of its potential liability.[143]

Rule 3 of the Rules of Procedure, which relates to the time for presenting claims before deputy commissioners, has been held to be mandatory, but subject to waiver by the parties.[144] This Rule applies to original proceedings before the deputy commissioner as well as to modification proceedings.[145]

The Industrial Commission has adopted a new Rule, Rule 22, relative to mortality tables. The Rule utilizes the United States life tables in determining present value of future payments of compensation.

XVIII. THIRD PARTIES AND SUBROGATION

Attempts to classify some contractors as fellow employees, and attempts to get the sub-contractor through the negligence of the sub-contractor's employee, have been denied because of the exclusive remedy doctrine of the Workmen's Compensation Act. In *May v. J.M. Montgomery Roofing Co.*,[146] the claimant was limited to compensation where his injuries were sustained as a result of a sub-contractor's employee's negligence, the sub-contractor being protected by the exclusive remedy doctrine. Subsequently, in *Edwards v. O. L. Richey*,[147] the claimant, an employee of the general contractor, was injured by a scaffold plank belonging to a sub-contractor. The claimant brought a third party suit against the sub-contractor and alleged that the suit could be maintained because the sub-contractor was being sued in his capacity as a fellow employee. Under the facts of the case, it was held that the sub-contractor could not be classified as a fellow employee.

The amount of subrogated interest which a carrier has in a third party law suit has been held to be discretionary. A trial court's allowance

142. FLA. STAT. § 440.25(3)(a) (1963).
143. FLA. STAT. § 440.42(3) (1963).
144. *Supra* note 133.
145. B.F. Todd Elec. Contractors v. Hammond, 164 So.2d 513 (Fla. 1964).
146. 158 So.2d 147 (Fla. 3d Dist. 1963).
147. 173 So.2d 497 (Fla. 2d Dist. 1965); the exclusive remedy doctrine held to be a matter of defense and not properly the subject of a motion to dismiss in Preston v. Grant Advertising, Inc., 166 So.2d 219 (Fla. 3d Dist. 1964).

of nothing was affirmed in *United States Fid. & Guar. Co. v. Harb.*[148] The subrogated interest of the workmen's carrier extends to all compensation which is paid, without regard to whether it is paid to a widow or for the benefit of minor children.[149] It includes medical expenses, but not funeral bills.[150]

XIX. Additional Decisions of Interest

In *Carraway v. Armour & Co.*,[151] a paraduodenal hernia was held compensable under the Workmen's Compensation Act, but not under the hernia section. It was there decided that only inguinal, femoral, and those similar to these specified hernias, come under the hernia section.

An attempt to set aside a joint petition, which disposed of claimant's rights, was denied in *State v. Florida Industrial Comm'n*,[152] it being held that joint petitions need not be verified.

In 1963, an opinion construed the 1953 provisions of the Workmen's Compensation Act relative to permanent total disability. In *Winn-Dixie Stores, Inc. v. Hinson*,[153] the claimant was found to be permanently and totally disabled which, under the law as it existed at the time, provided for a maximum payment of 700 weeks compensation. The claimant had already been paid 350 weeks compensation for temporary total disability. The deputy commissioner denied credit for the 350 weeks. In reversing the deputy, the court directed credit to be granted and noted that the disability had been permanent from its inception.

XX. Conclusion

The most significant developments in the period surveyed are those governing the Rules of the Florida Industrial Commission and the obligations of the medical practitioners and medical institutions to file medical reports. Technicality has become more prevalent with administrative sclerosis[154] and protracted appeals delaying finality and payment of awards. During the period surveyed the Florida Supreme Court adopted a new procedure of denying judicial review without granting oral argument, and without opinion, in approximately one-half of the cases filed in the court.

The statistical information furnished by the Florida Industrial

148. 170 So.2d 54 (Fla. 3d Dist. 1964); See also Security Mut. Cas. Co. v. Grice, 172 So.2d 834 (Fla. 2d Dist. 1965), for an allowance of 35 percent of compensation paid.

149. Pursell v. Sumter Elec. Co-op., Inc., 169 So.2d 515 (Fla. 2d Dist. 1964).

150. Hartford Acc. & Indem. Co. v. McNair, 152 So.2d 805 (Fla. 1st Dist. 1963).

151. 156 So.2d 494 (Fla. 1963).

152. 151 So.2d 636 (Fla. 1963).

153. 155 So.2d 537 (Fla. 1963).

154. A term used by senior Deputy Commissioner Samuel Halpert at the October 1965 meeting of the Florida Bar Committee on workmen's compensation.

Commission indicates the total injuries reported to the commission in the year 1963, was 203,407. The reported injuries increased in 1964, to 222,485. In the year 1963, deputy commissioners entered orders on 7,677 claims and in 1964, the total orders entered amounted to 8,911 or an increase of 1,234 orders. However, of the orders entered in 1963, 48.4 percent were "wash-out" orders approving joint petitions not subject to modification, the total of these orders being 3,715. In 1964, 55.9 percent of the total orders entered were "wash-out" orders approving joint petitions not subject to modification, the total of these orders being 4,983. Consequently, the total increase in orders from 1963 to 1964, can be attributed directly to the alarming increase in the number of cases disposed of under the "wash-out" or joint petition procedure, the numerical increase amounting to 1,268 in the year 1964.[155]

155. Included in "orders entered" are those orders which extended time for taking testimony of which there were 149 in 1964 and miscellaneous orders of unknown character of which there were 795 in 1964. If these orders were excluded and adjudications only were considered, the wash-out orders would account for 62.5 percent of the total adjudications of claims before deputy's in 1964.